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In the

Supreme Court of the United States

OCTOBER TERM, 1967.

SAM GARAFOLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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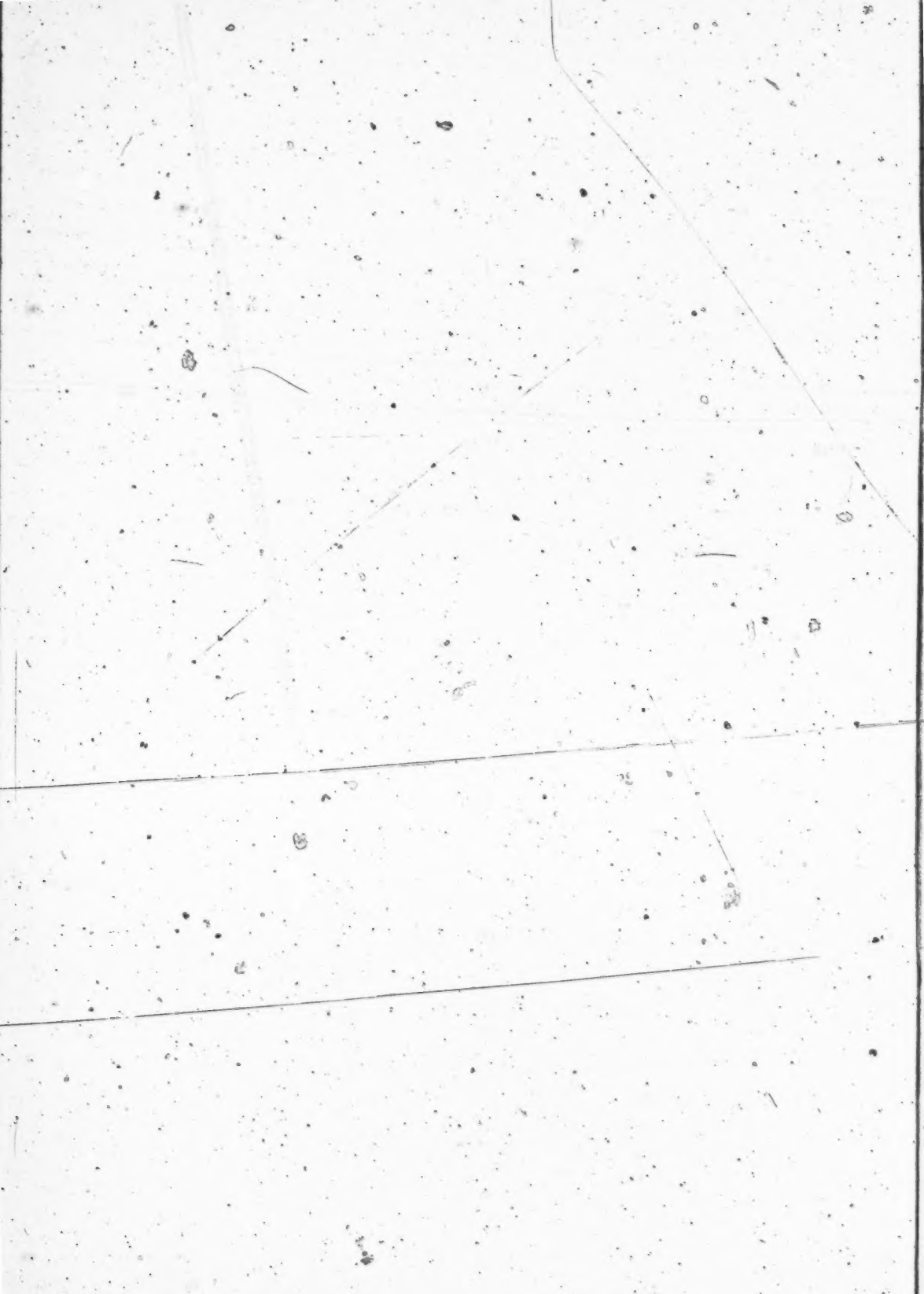

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit entered on October 11, 1967, affirming, one judge dissenting, the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, finding the petitioner guilty of various violations of Title 21, Section 174, United States Code and Title 26, Section 4705 (a), United States Code, and sentencing him to the custody of the Attorney General of the United States for a period of ten years.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on May 3, 1966, without opinion and is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit, affirming the judgment, one judge dissenting, of the District Court was filed October 11, 1967, No. 15813, and is not yet reported, but is set forth in Appendix A.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit was entered on October 11, 1967, and a timely petition for rehearing was denied on November 1, 1967. The jurisdiction of this Court is involved under Title 28, Section 1254 (1), United States Code.

QUESTIONS PRESENTED

1. Where the record of the trial court is devoid of any affirmative evidence of consent, may the Court of Appeals infer that a party to a telephone conversation who is also an informer and faces jail or prosecution if he does not cooperate, voluntarily consented to the monitoring of his telephone calls to petitioner?

2. Where the government's principal witness against the petitioner was a convicted murderer, was it not error for the Court of Appeals to sustain the judgment of the District Court which refused to instruct the jury that it could consider the fact of the witness' felony conviction in determining his credibility?

3. Where the government's principal witness against the petitioner was a convicted murderer and informer, was the Trial Court's refusal to permit cross examination

respecting his place of residence prejudicial error in light of this Court's decision in *Alford* v. *United States*, 282 U.S. 687 (1931)?

4. Did not the District Court fail to exercise its discretion in permitting a key government witness to sit at government counsel table and testify as an occurrence witness as an exception to the order excluding witnesses?

On appeal to the Seventh Circuit, petitioner also contended that the District Court committed error in replacing a regular juror with an alternate juror without consent of the petitioner and without conducting a hearing in the presence of the petitioner as to whether the juror had become unable or disqualified to perform her duties. This contention was rejected below; for the Seventh Circuit's discussion thereof, see Appendix A.

We respectfully submit that this determination was in error, and although this issue is not urged herein as a basis for granting certiorari, we respectfully seek leave to raise and argue this issue if certiorari is granted.

STATUTES AND RULES INVOLVED

Title 47, Section 605, United States Code.

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which

the communications may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

Rule 7. Criminal Rules of the United States District Court for the Northern District of Illinois

General Instructions. In all criminal procedures the following instructions shall be considered by the Court, pursuant to the Federal Rules of Criminal Procedure.

'Manual on Jury Instructions in Federal Cases' by Hon. Walter J. LaBuy. (Added by General Order May 10, 1965.)

STATEMENT OF THE CASE.

The petitioner was indicted along with three other individuals in an eleven count indictment which charged them with various violations of Section 4705 (a), Title 26, United States Code and Section 174, Title 21, United States Code. The petitioner was acquitted by the jury as to Count XI of the indictment, but was convicted as to the remaining ten counts. The other three defendants were acquitted by the jury as to all counts in which they were named in the indictment.

Prior to the first witness being called on behalf of the government, the defendants moved for the exclusion from the courtroom of all witnesses. However, despite the defendants' objections, federal narcotic Agent Vernon D. Meyer was permitted to sit at the government's counsel table even though he was to testify as an occurrence witness (A. 10).[1]

The government's first witness was Ted Haney, a convicted murderer, who testified that on October 31, 1963, while at the office of the Federal Bureau of Narcotics, he telephoned the petitioner while narcotic Agent Meyer listened to the conversation on an extension telephone (A. 10). Haney made arrangements to meet the petitioner at his place of business, the Web Tavern, at about 8:00 P.M. that night (A. 11). That evening he went into the Web Tavern with narcotic Agent Cook and gave the petitioner $1,050 which he had received from Agent Cook. Petitioner gave him a brown manila envelope which he later gave to Cook.

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[1] All record references are to the documents filed in the United States Court of Appeals for the Seventh Circuit. "A" refers to petitioner's Appendix filed in that court.

On November 13, 1963, in the presence of Agent Cook, Haney dialed the petitioner's telephone number and made an appointment to meet him later that evening. Cook drove Haney to the vicinity of the Web Tavern, gave him $700, and he entered the Web Tavern. Haney gave the $700 to the petitioner, returned to Agent Cook's automobile and gave him a package which he had gotten from the petitioner.

Haney again called the petitioner on December 3, 1963, while Cook listened on an extension telephone, and he made arrangements to meet petitioner later that evening. That evening Cook drove Haney to the vicinity of the Web Tavern, gave Haney $700 and shortly thereafter he returned to Cook's automobile from the Web Tavern and gave Cook a manila envelope which he had gotten from the petitioner (A. 12).

On December 18, 1963, Haney again called petitioner and made arrangements to meet him later in the evening. Cook listened to the conversation on an extension telephone. Haney was driven to the vicinity of the Web Tavern by Cook and given $700. He entered the tavern and returned shortly afterwards with a manila envelope which he had received from the petitioner after giving him the $700 (A. 13).

Cook again came to Haney's home on January 9, 1964. While there Haney called the petitioner and told him that he would see him that evening. Cook listened to the conversation between Haney and the petitioner on an extension telephone. Later that evening Cook picked up Haney and drove him to the vicinity of the Web Tavern and gave him $2,100. Haney entered the tavern and returned shortly with a brown paper bag containing three manila envelopes which he had gotten from the petitioner in exchange for the $2,100 (A. 14).

On cross examination the court sustained a government objection to a defense question relating to the address of Haney (A. 14). Haney stated that he was arrested by Agent Meyer on October 31, 1963, for the sale of narcotics but that he had never been prosecuted (A. 15). He also said that the agents had told him that they would talk to the United States Attorney about his not being prosecuted (A. 16).

Despite objections by the defense, Narcotic Agent Cook was permitted to divulge the contents of telephone conversations between Haney and the petitioner on November 13, 1963; December 3, 1963; December 18, 1963, and January 9, 1964, which he overheard by listening on an extension telephone in Haney's home (A. 16-20). At no time did he testify that Haney had given his consent to the listening to these conversations or to the divulgence of them.

Narcotic Agent Vernon Meyer was permitted to testify over defense objections that he not be permitted to testify for the reason that he was allowed to sit at the government counsel table even though the defense had requested that all witnesses be excluded from the courtroom (A. 20). Over objection he was also permitted to divulge the contents of a telephone conversation between Haney and the petitioner on October 31, 1963, that he had overheard on an extension telephone (A. 21).

Narcotic Agent Robert J. DeFauw testified that he was in the Web Tavern on the nights of November 13 and December 3, 1963, and that he saw Haney give the petitioner some money and receive a manila envelope (A. 24). On December 18, 1963, he saw DiCaro and Cordovano, two of the acquitted defendants, drive up in front of the Web Tavern, and he observed DiCaro go into the tavern for

a few minutes. He saw Rancatore, the other acquitted defendant, enter the Web on December 3, 1963, and give petitioner a newspaper wrapped package. On December 18, 1963, he saw Rancatore enter the Web and give the petitioner a folded towel.

Former narcotic agent William J. Olivanti stated that on December 3, 1963, he heard DiCaro say to Cordovano, upon returning from answering a telephone call, "Garf just called. The nigger wants two." (A. 25). Cordovano then turned to Rancatore and said, "Go get it." Olivanti then went into the Web where he saw Agent DeFauw and the petitioner. He observed Haney enter and give the petitioner some money. The petitioner then gave Haney a manila envelope which he took from a newspaper. On December 18, 1963, he saw Haney give the petitioner some money, and then the petitioner gave Haney a manila envelope which he got from a towel. Later he saw DiCaro enter the Web and get some money from the petitioner.

On January 9, 1964, he was at the Web when he saw Haney enter, give the petitioner some money and leave with a brown bag which the petitioner had given to him (A. 26).

The government chemist, John D. Endriz, stated that the white powder in the various government exhibits contained heroin hydrochloride.

Acquitted defendant James Cordovano denied having accompanied DiCaro in his car to the Web on December 18, 1963, and he also denied that on December 3, 1963, he told Rancatore, "Go get it." (A. 28).

On the morning of March 16, 1966, after the trial had been in progress for several days, the trial judge an-

nounced that one of the jurors had not recovered from her virus and that he had already had the alternate take her place (A. 29).

Joseph DiCaro, another acquitted defendant, denied having a telephone conversation with petitioner on December 3, 1963, or that he ever talked to petitioner about a "Ted" (A. 29). He also denied ever referring to petitioner as "Garf" (A. 30).

The other acquitted defendant, James Michael Rancatore, denied having ever delivered any newspaper wrapped packages to petitioner and also denied certain conversations with petitioner attributed to him by Agent DeFauw (A. 32).

Petitioner did not testify nor did he submit any evidence in his behalf.

In compliance with Rule 30 of the Federal Rules of Criminal Procedure, the petitioner tendered a written instruction to the effect that the prior felony conviction of the witness Haney could be considered by them in determining the credibility to be given Haney's testimony (R. 72).[2] However, the trial judge refused to so instruct the jury.

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[2] "R" refers to the Original Record on Appeal filed in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The record of the trial court is devoid of any affirmative evidence of consent to the monitoring of the telephone conversations between the petitioner and the government witness Haney. A government informer who faces jail or prosecution if he does not cooperate cannot properly be regarded as a consenting party. The decision of the Court below is in conflict with prior decisions of this Court.

Notwithstanding the fact that there was no evidence adduced during the trial of this cause to show that Agents Cook and Meyer had been authorized by one of the parties to the telephone conversations between Haney and the petitioner, these government witnesses were permitted to divulge the contents of these five conversations which they overheard by listening on an extension telephone. (A. 17-18, 19, 21).

Section 605, Title 47, United States Code, states in part that ". . . no person not being authorized by the sender *shall* intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ." (Emphasis added.).

That a telephone conversation is within the purview of this statute was established in the case of *Rathbun* v. *United States,* 355 U.S. 107 (1957), wherein this court held that the contents of a communication overheard on a telephone extension are admissible *provided there is consent of one of the parties to the conversation.* This court has also stated that the requisite consent must be *voluntary* and authorization given *in the hope of leniency* is not that type of consent intended by this statute. *Weiss* v. *United States,* 308 U.S. 321 (1939).

The opinion of the Court of Appeals appears to be in conflict with the *Weiss* decision, and the Court of Appeals endeavors to distinguish the case at bar from this court's opinion in the *Weiss* case by stating on pages 8 and 9 of its opinion:

> "In *Weiss*, there was no knowledge of or consent to the interception, and the *consent to divulgence* was obtained by means of promised leniency. Here, every fair inference to be drawn establishes that Haney consented to the monitoring of his calls to appellant. There is nothing in the record to indicate that threats or promises were used to obtain his cooperation and consent."

However, in the case at bar the evidence showed that at the time of the first telephone call, which was made from the office of the Federal Bureau of Narcotics, and listened to on an extension telephone by Agent Meyer, Haney was in custody having just been arrested for a sale of narcotics (A. 15). Furthermore, Haney testified that the agents told him they would talk to the United States Attorney about his not being prosecuted (A. 16); and evidently the talking to must have been done inasmuch as Haney has still not been prosecuted for the offense of sale of narcotics.

From these facts it is reasonable to conclude that there was an *implied threat* to Haney that he would be indicted for the narcotic offense in the event that he did not cooperate with the narcotic agents and an *implied promise* that he would not be indicted if he did cooperate with them. As a result of this "enforced agreement" on the part of Haney to cooperate with the government, any purported consent given by him to "intercept" and "divulge" these telephone conversations would be involuntary.

In *United States* v. *Laughlin*, 223 F.Supp. 623 (D.C. 1963), the District Court held that where a witness admitted she had committed perjury and felt that she had to cooperate with prosecuting officials, her consent to them to record her telephone conversations with the defendant was not voluntary within the relevant communications statute.

In a companion case, *United States* v. *Laughlin*, 222 F. Supp. 264 (D.C. 1963), the court stated on pages 268 and 269:

> "In the present case, it is clear to the Court that the statements of both Mr. Sullivan (an Assistant United States Attorney) and the deputy foreman of the Grand Jury, as quoted above, amounted to an implied promise that if Mrs. Gross consented to have the recordings made, she would not be indicted for perjury. Thus there was a clear 'hope of leniency', *supra*, in Mrs. Gross' mind, which hope was deliberately created by the implied promises of both Mr. Sullivan and the deputy foreman. Her consent, under the implied threat of being indicted if she did not cooperate and under the implied promise that she would not be indicted if she would cooperate, is not the kind of 'authorization' contemplated by 47 U.S.C. § 605, as *Weiss* makes abundantly clear. Mrs. Gross has not been indicted by the Grand Jury.
>
> "The Government argues that the present case is different from the facts discussed in *Weiss* in that here the recordings were made after she agreed to cooperate, while in *Weiss* the recordings were made *before* such agreement. It seems to this Court, however, that the timing of the consent does not go to the issue of whether or not it was voluntarily given, and that purported consent before the recordings are made is bad, if not worse, than purported consent if such recordings have already been made."

Among the cases cited by the Court of Appeals in support of its decision that no error was committed in permitting narcotics Agents Cook and Meyer to testify concerning telephone conversations between Haney and the petitioner overheard by them by the use of extension telephones is the case of *United States* v. *Campbell*, 7 Cir., 337 F.2d 396 (1964), cert. den. 379 U.S. 783 (1965):

> "The instant case is distinguishable from *Weiss* in that Baker gave his consent *before* the communication took place and petitioner does not assert that Baker was promised leniency in return for permitting Morris to monitor the conversation." 337 F.2d 369 at page 398.

From Haney's testimony that he had been told that the narcotic agents would talk to the United States Attorney about his not being prosecuted, it can only be concluded that there was a *clear hope of leniency* created in his mind and thus the consent was enforced and not voluntary. A government informer who faces jail or prosecution if he does not cooperate should not be regarded as a consenting party under the provisions of the communications statute.

2. The petitioner was prejudiced by the Trial Court's refusal to instruct the jury that it could consider the fact of the prior felony conviction of the government's principal witness in determining his credibility.

The government's principal witness against the petitioner was Ted Haney. The evidence was undisputed that he was not only an informer for the Bureau of Narcotics but also that Haney had previously been convicted of a felony—the crime of murder (A. 10). Despite the evidence of Haney's prior felony conviction, the trial judge erroneously refused to instruct the members of the jury that they could consider the fact of Haney's previous fel-

ony conviction in determining his credibility and the weight to be given his testimony. The petitioner tendered the following instruction to the court (R. 72):

> "You are instructed that Ted Haney is an informer for the Bureau of Narcotics. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by his interest or his prejudice against the defendant.
>
> *"You are further instructed that the evidence shows that the informer, Ted Haney, has been convicted of a felony. The testimony of a witness may be discredited or impeached by showing that he has been convicted of a felony.* As such, his testimony must be carefully examined and weighed with great care." (Emphasis added.)

However, this requested instruction of the petitioner was rejected by the trial judge, and instead the jury was instructed along the following lines:

> "If you find from the evidence that Ted Haney is an informant of the Federal Bureau of Narcotics, you may consider the principle that the testimony of an informer who provides evidence against the defendant or for immunity from punishment or personal advantage or vindication must be examined and weighed by you with greater care than the testimony of an ordinary witness. As such his testimony must be carefully examined and weighed with great care." (A. 46)
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> • • •
>
> "One of the methods of impeaching or impairing the testimony of a witness is to show that on a material point he has made an inconsistent or conflicting statement at some other time or on some other in-

stance, and this is one of the matters you should take into consideration in determining the credibility of such a witness." (A. 49)

• • •

"Evidence of a defendant's previous conviction of a felony is to be considered by you only insofar as it may affect the credibility of the defendant as a witness and must never be considered by you as evidence of guilty (sic) of any of the offenses for which he is standing trial." (A. 50)

The dissenting opinion of the Court of Appeals stated that it was obvious that the court erred in rejecting the tendered impeachment instruction which applied a well established test to the value of the testimony of Haney. (Page 13 of the opinion of the Court of Appeals.)

In failing to instruct the jury in the manner requested, the trial judge was proceeding contrary to Rule 7 of the Criminal Rules of the United States District Court for the Northern District of Illinois which states as follows:

"General Instructions. In all criminal procedures the following instructions *shall* be considered by the Court, pursuant to the Federal Rules of Criminal Procedure.

"'Manual on Jury Instructions in Federal Cases' by Hon. Walter J. LaBuy. (Added by General Order May 10, 1965.)" (Emphasis added.)

See Manual on Jury Instructions in Federal Criminal Cases, Section 6.06-2, page 46, which was prepared by the late Judge Walter J. LaBuy while Chairman of the Seventh Circuit Judicial Conference Committee on Jury Instructions:

"The testimony of a witness may be discredited or impeached by showing that he had been convicted of a felony . . ."

A similar instruction has also been recommended by the Honorable William C. Mathes, United States District Judge for the Southern District of California, in "Jury Instructions and Forms for Federal Criminal Cases", 27 F.R.D. 39, Sections 3.06 and 3.08.

Although this rule does not make it mandatory upon the trial judge to always instruct the jury in accordance with Judge LaBuy's Manual, certainly, if the rule is to have any effect, these instructions should be given when applicable unless there is a compelling reason for not instructing pursuant to Judge LaBuy's Manual, which the Chief Judge of the United States Court of Appeals for the Seventh Circuit has declared to be "A product of judicial research in its highest form and will be the basis for a lasting and valuable authoritative guide for many years to come." See Letter of Chief Judge, dated November 8, 1963, page III of Judge LaBuy's Manual.

In reaching its decision the Court of Appeals relies on the Seventh Circuit case of *Ruvel* v. *United States,* 12 F.2d 264 (1926). However, this decision was prior to the enactment of Rule 7 of the District Court.

It is further in conflict with the Seventh Circuit case of *United States* v. *Senior,* 274 F.2d 613 (7 Cir. 1964), wherein the Court of Appeals stated at page 616:

> "We agree with counsel for the government that it was proper for the government to show that the witness Laurie had been convicted of a felony. This is a well established method of impeachment long known to the law."

The decision of the Court of Appeals in the case at bar is also in conflict with a decision of the Court of Appeals for the Third Circuit wherein it was held that the failure of the court to instruct the jury that it could consider the

fact of a prior felony conviction as bearing upon the credibility of a witness was reversible error. *Delaney* v. *United States*, 77 F.2d 916 (3 Cir. 1935).

The Court of Appeals also relies heavily on the recent opinion of *Hardy* v. *United States*, 343 F.2d 233, 234 (D.C. Cir. 1964), reh. den. en banc, 343 F.2d 235 (1964); cert. den., 380 U.S. 984 (1965) (pages 5-6). The *Hardy* case involved the question of the effect of the failure to give a cautionary instruction respecting the testimony of a police informer. However, there appears to be a difference of opinion among the Courts of Appeal as to the effect of the failure to give such cautionary credibility instructions. A recent decision of the Sixth Circuit appears to be in direct conflict with the *Hardy* case. In the case of *United States* v. *Griffin*, 6 Cir. No. 16933, ... F.2d ..... (Decided August 23, 1967), the conviction of the defendant was reversed because the trial court failed to give a cautionary instruction respecting the testimony of an informer even though no such instruction was requested by the defendant in the trial court. The Sixth Circuit stated on pages 11 and 12 of the slip opinion:

> "Conviction might probably have resulted even if the cautionary instruction had been given, but this is not the criterion. *Kotteakos* v. *United States*, supra, 328 U.S. at 776 (headnote 11). . . .
>
> ". . . 'Had the jury convicted on proper instructions it would be the end of the matter . . . .,' *Morrisette* v. *United States*, supra, 342 U.S. at 276, but the only way now to eradicate the omission and accord Griffin his rights is to grant a new trial."

The Court of Appeals also stated that a witness' prior conviction has a natural tendency to reflect upon his veracity, and that tendency does not require the reenforcement of a specific instruction. However, in the case at

bar the trial judge specifically told the jury that a witness could be impeached by the showing of a prior inconsistent statement (A. 49). He further specifically instructed the jury as to the relationship between a prior felony conviction and the credibility of a defendant who testifies (A. 50). Since the court made no reference whatsoever, in its instructions to the jury, as to the effect of a prior felony conviction on a witness other than a defendant and did specifically enumerate the ways in which a witness could be impeached, the jury might well have been confused and thought that a felony conviction could not be considered by them in determining whether or not an ordinary witness had been impeached or discredited, and that a witness could be impeached or discredited only in the manner specifically mentioned by the trial judge.

3. The petitioner was prejudiced by the Trial Court's refusal to permit cross examination respecting the place of residence of the government's principal witness who was a convicted murderer as well as an informer for the government. The ruling of the Court of Appeals is in conflict with this Court's decision in Alford v. United States, 282 U.S. 687 (1931).

The opinion of the Court of Appeals in upholding the District Court's refusal to permit petitioner's inquiry on cross-examination respecting the place of residence of the government's principal witness, Ted Haney, is in direct conflict with this Court's rulings in *Alford* v. *United States,* 282 U.S. 687 (1931), and *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937).

In the *Alford* case the sole ground for reversal was the refusal of the trial court to permit cross-examination of a government witness respecting his place of residence. There also, the government objection was based on the fact that a witness' place of residence was immaterial and not a proper subject of cross-examination.

"Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . *To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . . .* In this respect a summary denial of the right of cross-examination is distinguishable from the erroneous admission of harmless testimony.

"The present case, after the witness for the prosecution had testified to uncorroborated conversations of the defendant of a damaging character, was a proper one for searching cross-examination. *The question, 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness, but on its face, without any such declaration of purpose as was made by counsel here, was an essential step in identifying the witness with his environment, to which cross-examination may always be directed."* (Emphasis added.) *Alford* v. *United States,* 282 U.S. 687, 691-693 (1931).

The Appellate Court of Illinois has also held that it was reversible error not to permit the defense to cross-examine an addict-informer as to his place of residence. *People* v. *Smith,* 69 Ill. App. 2d 83, 216 N.E.2d 520 (1966).

The credibility of a witness and his motives for testifying are always critical points for a defendant's case and wide latitude should be given a defendant in endeavoring to explore these matters fully on cross-examination. Here the witness Haney was a convicted murderer (A. 10), an informer, an accomplice and he had also been arrested on October 31, 1963, for the sale of narcotics, an offense for which he was never prosecuted, and he was unemployed since the date of arrest (A. 15). His testimony was undoubtedly an important factor in the jury's determination of the guilt or innocence of the petitioner.

Under these circumstances his place of residence was a proper subject of inquiry on cross-examination to determine his interest, if any, in the outcome of the petitioner's case, his motives for testifying against the petitioner and his complete environment prior and subsequent to the occurrence of the events alleged in the indictment and to which he testified.

Whether or not the outcome of the trial would have been different had the witness been permitted to answer the question concerning his place of residence should not be considered by this Court in determining the prejudicial nature of the refusal. See *Dixon* v. *United States,* (5 Cir. 1964) 333 F.2d 348, wherein the court stated at page 353:

> *"When cross-examination is involved, the defendant need not show that he would win his case if permitted the right denied him."* (Emphasis added.)

4. The District Court failed to exercise its judicial discretion in permitting a key government witness to sit at the government counsel table and testify as an occurrence witness as an exception to the order excluding witnesses.

After the selection of the jury and prior to opening arguments of counsel, the defense made a motion to exclude

all witnesses from the courtroom (A. 10). This motion was granted by the court with the exception that Narcotics Agent Meyer was permitted to sit at the government counsel table even though the government stated that Meyer was to be an occurrence witness. The pertinent parts of the colloquy that took place between the court and counsel at the time of the motion is set forth in Appendix B.

Although it is conceded that the exclusion of witnesses is within the sound discretion of the trial court, and failure to exclude witnesses does not constitute error unless there is a clear abuse of discretion, petitioner contends that the colloquy definitely shows that the trial court failed to exercise its discretion.

The decision of the Court of Appeals is in conflict with that of *Charles* v. *United States,* 215 F.2d 825 (9 Cir. 1954). The court in ruling that it was error not to exclude witnesses stated on page 827 of its opinion:

> "The practice of putting witnesses under the rule is a time-honored one and should not be abandoned. Of course all witnesses are (as the District Court said) 'required to tell the truth under oath whether they hear anybody else testifying or not'. Unfortunately, however, some witnesses pay little heed to this requirement. Such witnesses may, and often do, shape their testimony to match that given by other witnesses within their hearing. To prevent such matching of testimony is the prime purpose of putting witnesses under the rule.
>
> "It is true that the power to put witnesses under the rule is a discretionary one, and that where, in the exercise of its discretion, a district court refuses to put witnesses under the rule, its action is reviewable only in case of an abuse of discretion. *Here, however, there was no exercise of discretion.* (Emphasis added.)

Instead, there was, in effect a declaration by the District Court that it had abandoned and would not follow the practice of putting witnesses under the rule. This was error."

During the colloquy between the court and counsel the court suggested to the prosecution that it arrange its testimony so that there could be a *complete exclusion* (App. 17a). He also told the prosecution that by insisting on having Meyer in the courtroom they were taking a grave risk and that if he were the prosecutor he would not take such a chance (App. 17a). Later the trial judge told the prosecutor that some law "has been ineptly made necessary by prosecutive determination to utilize unnecessary advantages" (App. 18a). Obviously in an effort to have the government withdraw its insistence upon keeping Agent Meyer in the courtroom, the trial judge stated that the way to "meet serious tactical problems is to not be persistent in unnecessary things" (App. 20a). He also said that he would not take the chance of a case being reversed by "being insistent upon keeping somebody in the room that I need as a witness. I would master that case outside of the courtroom" (App. 20a). The trial judge also stated that one of the things that was causing the President's Crime Commission some concern was the prosecution's "untactical persistence in old procedures" (App. 20a).

It is very evident from this colloquy that had the trial judge exercised his judicial discretion in this matter, he would have ruled in favor of the defense and also excluded Agent Meyer from the courtroom. However, rather than exerci such discretion, he stated that he would leave the decision to the prosecution (App. 17a). The trial judge further stated to the prosecution during this discussion as to whether or not Meyer should be permitted to remain

in the courtroom, "But that is up to you. I can try a case the second time. I just might have a retrial of the case on that issue, but this is up to you." (App. 19a)

Still further the trial judge stated that if he were the prosecutor, he would not insist upon Meyer's presence in the courtroom but, "This is up to you. If you want this, I will allow it, . . ." (App. 20a). Before making his ruling, the trial judge then suggested that the prosecution take another look at it, but at the same time he said, ". . . I will rule for you on this, whichever way you go, . . ." (App. 21a).

In support of petitioner's contention that the trial court failed to exercise its judicial discretion, we should like to call the Court's attention to the recent unreported case of *Jackson* v. *United States,* D.C. Cir. No. 4184, ... F.2d ..... (1967), Decided August 10, 1967. In that case the defendant who had two prior convictions took the stand in his own defense and was cross examined by the prosecutor concerning these convictions. The trial judge permitted this line of cross examination and stated, "Against my better judgment I am going to let him put it (prior convictions) in." The Court of Appeals reversed the conviction and stated on page 3 of the slip opinion:

> "We think the trial court misconstrued *Luck*. . . . We find nothing in *Luck* or the decisions following it that in any instance obligated a trial judge to admit a criminal record against his better judgment. *Luck* specifically accords to the trial judge a sound discretion in admitting or rejecting a criminal record. *It appears that the trial judge failed to exercise his discretion and there must be a new trial.*" (Emphasis added.)

Petitioner submits that a determination by the trial judge to follow the rule excepting an investigative officer from the order excluding witnesses without the showing by the prosecution of any valid reasons therefor does not amount to the exercise of sound discretion by the trial court. The statements of the trial judge at the hearing of the motion, on the contrary, appear to be reasons for not granting the exception.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

September, 1967 Term and Session

No. 15813
United States of America,
Plaintiff-Appellee,
v.
Sam Garafolo,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before HASTINGS, *Chief Judge* and SCHNACKENBERG and KNOCH, *Circuit Judges.*

HASTINGS, *Chief Judge.* Sam Garafolo appeals from a judgment of conviction and sentence of ten years, following a trial by jury, for violations of the federal narcotics laws.

He was found guilty on five counts of the possession of narcotics in violation of § 174, Title 21 U.S.C.A., and on five counts for the sale of narcotics in violation of § 4705(a), Title 26 U.S.C.A. He was found not guilty of conspiracy as charged in Count XI of the indictment. The other three defendants were found not guilty by the jury as to all counts in which they were named.

No question is raised on this appeal as to the sufficiency of the evidence to support the convictions.

Appellant charges five procedural or trial errors as the basis for a reversal of the convictions below.

The indictment charges that on five dates in late 1963 and early 1964 appellant possessed and sold heroin to one Ted Haney. A brief summary of the evidence follows.

Haney was a principal Government witness at the trial. He testified he was arrested for selling narcotics on October 31, 1963, and was taken to the office of the Narcotics Bureau in Chicago. While at the office he made a telephone call to appellant at the Web Tavern in Chicago, where appellant was employed, while Narcotics Agents Vernon Meyer and Clarence Cook listened on an extension telephone, *in view of Haney*. Appellant answered the phone and Haney arranged to meet him at the Web Tavern that evening on a business transaction. Haney was accompanied by Agent Cook to the meeting with appellant. After appellant served Haney at the bar, Haney told appellant he had $700 for "stuff." Appellant then gave Haney a brown manila envelope, in exchange for the money, and Haney left the tavern with Agent Cook. The contents of the envelope were tested and found to be heroin.

Haney testified that on each of four subsequent dates he made a telephone call from his home to appellant at the Web Tavern, while Agent Cook listened on an extension phone, *in view of Haney*. On each occasion he arranged to meet appellant at the tavern. He then went to the tavern in the company of Agent Cook, entered the tavern, gave appellant funds furnished by the Narcotics Bureau, and received a package, which he turned over to narcotics agents after leaving the tavern. The contents of the packages were tested and found to be heroin.

Narcotics Agent Meyer testified he monitored the call Haney made to appellant from the office of the Narcotics Bureau on October 31, 1963. Meyer corroborated Haney's testimony concerning his conversation with appellant. He also testified to his observations from outside the Web Tavern on the occasions of the five sales of heroin covered by the indictment.

Agent Cook testified he monitored four telephone calls made by Haney from Haney's home to appellant at the Web Tavern. He used an extension telephone, *in view*

of Haney. He corroborated Haney's account of those conversations, and testified concerning the transactions between Haney and appellant in the Web Tavern on October 31, 1963.

Other narcotics agents testified to their observations inside and outside the Web Tavern on the occasions of the five sales of heroin. According to their testimony, Haney entered the tavern on the dates of the last four sales charged in the indictment and gave appellant money in exchange for an envelope or package. Their descriptions of the envelope or package matched the descriptions given by Haney.

Appellant's chief contention is that the trial court erred in refusing to give a tendered instruction that the jury could consider witness Haney's prior conviction of a felony in determining his credibility.[1] The trial court instructed the jury that evidence of a *defendant's* prior felony conviction could be considered only insofar as it might affect his credibility, and also instructed the jury that they should take into consideration the prior inconsistent statements of a witness in determining the credibility of the witness. Appellant argues that the giving of these specific instructions and the omission of a specific instruction on the effect of a prior felony conviction on a witness' credibility might have given rise to an implication that the jury should disregard witness Haney's felony conviction in determining his credibility.

Appellant has not shown prejudice resulting from the trial court's refusal to give the requested instruction.

---

[1] The refused tendered instruction reads:

"You are instructed that Ted Haney is an informer for the Bureau of Narcotics. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by his interest or his prejudice against the defendant.

"You are further instructed that the evidence shows that the informer, Ted Haney, has been convicted of a felony. The testimony of a witness may be discredited or impeached by showing that he has been convicted of a felony. As such, his testimony must be carefully examined and weighed with great care."

Early in its direct examination of Haney, the Government brought out his 1933 murder conviction. The fact of Haney's conviction was before the jury during his testimony. Although the trial court did not specifically call the conviction to the jury's attention, it gave the following broad, general instruction on the determination of credibility:

> "It is your province to determine the credibility of the witnesses and the weight to be given to their testimony. In weighing the testimony of each witness, you should consider his relationship to the government or to the defendant, the witness' interest, if any, in the outcome of the case, his manner of testifying, his candor, his fairness and intelligence and the extent to which he has been corroborated or contradicted, if at all, by other credible evidence, and if you believe that a witness willfully has sworn falsely to a material fact, you may disregard his testimony in part or in whole except insofar as it may have been corroborated by other credible evidence."
>
> • • •
>
> "You should consider all of the facts and circumstances in determining what credence to give to the testimony of each witness."[2]

This instruction negated any implication that might have arisen from the omission of the requested specific instruction. The fact that Haney was a convicted murderer was one likely to have a strong impact on the minds of jurors, not one likely to be overlooked if not specifically

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[2] It should be noted that in the refused tendered instruction (fn. 1) the concluding emphasis is that such "testimony must be carefully examined and weighed with great care." The trial court did exactly that in an instruction it gave on Haney's role as a Government informant:

> "If you find from the evidence that Ted Haney is an informant of the Federal Bureau of Narcotics, you may consider the principle that the testimony of an informer who provides evidence against the defendant or for immunity from punishment or personal advantage, or vindication must be examined and weighed by you with greater care than the testimony of an ordinary witness. *As such, his testimony must be carefully examined and weighed with great care.*" (Emphasis suppplied.)

called to their attention by an instruction. The effect of evidence of a witness' prior conviction is distinguishable from that of a defendant's prior conviction. If the latter is admitted an instruction is required to *limit* the jury's consideration of the evidence to the issue of the defendant's credibility as a witness, and to prevent consideration of the prior conviction in determining his guilt. A witness' prior conviction has a natural tendency to reflect on his veracity, and that tendency does not require the reinforcement of a specific instruction.

This court held in *Ruvel* v. *United States*, 7 Cir., 12 F. 2d 264 (1926), that the giving of an instruction on a witness' prior conviction rests in the sound discretion of the trial court:

> "We do not understand that any [duty to give an instruction on impeachment by prior conviction] rests on the court. In his sound discretion he should charge the jury on the subject of the credibility of witnesses. This was done in charging them that they are the sole judges of the credibility of witnesses, whose interest or bias should be taken into consideration, and that the jury should apply all tests which their common sense tells them should be applied in determining the weight of evidence. The court is not required to call attention to specific facts which may discredit witnesses, with possible exception, perhaps, of the cautionary charge as to accomplices, which is and ought usually to be given, and which was here fully given with respect to Mills." *Id.* at 265.

See also, *United States* v. *Inciso*, 7 Cir., 292 F. 2d 374, 381 (1961), cert. den., 368 U.S. 920 (1961); *United States* v., *Sorcey*, 7 Cir., 151 F. 2d 899, 901 (1945), cert. den., 327 U.S. 794 (1946); *Wainer* v. *United States*, 7 Cir., 82 F. 2d 305, 308 (1936). The instructions given in this case satisfy the *Ruvel* criteria. They inform the jury that theirs is the province to determine credibility, and that they should consider all of the facts and circumstances in determining credibility.

The District of Columbia Circuit recently considered an appeal involving this issue. The appellant had been convicted of violating various narcotics statutes. He argued on appeal that the trial court committed reversible error by refusing to give an instruction that the testimony of a police informer with prior narcotics convictions should be considered cautiously. In a per curiam opinion, the court affirmed:

> "First we note that the jury was fully advised of the informant's criminal record and drug addiction, and the jury was instructed that it was the sole judge of the credibility and weight to be given to each witnesses' testimony. Here the police informant's testimony was corroborated by other eyewitness testimony, and in these circumstances the refusal of the trial court to give a requested cautionary instruction is not reversible error. The trial judge is not an automaton mechanically required in all cases to give cautionary instructions such as those requested even though, as we have said, generally the trial court would be 'well advised' to do so and would have been on sounder ground had it given the cautionary instruction here. Some discretion rests in the judge, however, and we cannot view his action in the case as an abuse of discretion warranting reversal." *Hardy* v. *United States*, D.C. Cir., 343 F. 2d 233, 234 (1964), reh. den. en banc, 343 F. 2d 235 (1964), cert. den., 380 U.S. 984 (1965).

All of Haney's testimony relating to the telephone conversations with appellant and the purchases of heroin at the Web Tavern was corroborated by at least one narcotics agent who testified. Agents Meyer or Cook monitored each of the telephone conversations described by Haney and testified to their content. At the time of each purchase of heroin described by Haney, narcotics agents were conducting surveillance both inside and outside the Web Tavern. These agents testimonially confirmed Haney's account of the purchases.

Assuming, arguendo, that failure to give the requested instruction was error, it was harmless error. In a crimi-

nal case the test is "what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong in the minds of other men, not on one's own, in the total setting." *Kotteakos v. United States,* 328 U.S. 750, 764 (1946).

In the total setting of this case it is unlikely that the court's refusal to give the requested instruction had a substantial effect on the jury and affected the outcome of the case. As noted, Haney's prior conviction was before the jury, his testimony was corroborated, and the jury was instructed to consider "all of the facts and circumstances," as well as his role as a Government informant.

Moreover, the evidence of appellant's guilt is overwhelming and its sufficiency is not herein challenged. Disregarding Haney's testimony, there is evidence that on five occasions appellant arranged meetings with Haney and sold heroin to Haney.

Appellant contends the trial court erred in admitting the agents' testimony concerning Haney's telephone conversations with appellant, which they overheard by means of an extension telephone. Appellant argues that evidence of the conversations was inadmissible because obtained in violation of § 605, Title 47 U.S.C.A. Section 605 provides in part that:

> "[N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person * * *."

Evidence obtained in violation of § 605 is not admissible in a federal court. *Nardone v. United States,* 302 U.S. 379 (1937).

Appellant's argument falls short. A careful reading of the relevant record clearly demonstrates that no objection was made during the trial to the admissibility of the conversations on the grounds of a violation of § 605. This section of the statute was never mentioned.

Although appellant objected to questions asked of Agents Cook and Meyer in other respects, the § 605 question is raised here for the first time on appeal.

Further, it is apparent from the record that the trial court was probably unaware of § 605. When the court asked whether there was a requirement of permission to intercept a telephone conversation, counsel for all defendants remained silent.

An error not raised in the trial court may not be raised for the first time on appeal. *United States* v. *DiFronzo*, 7 Cir., 345 F. 2d 383 (1965), cert. den., 382 U.S. 829 (1965), reh. den., 384 U.S. 982 (1966); *Holmes* v. *United States*, 7 Cir., 323 F. 2d 430 (1963), cert. den., 376 U.S. 933 (1964); *United States* v. *Sferas*, 7 Cir., 210 F. 2d 69 (1954).

Defendants' general objections and specific objections on other grounds to the admission of the agents' testimony concerning the telephone conversations did not preserve the § 605 issue on appeal. See *On Lee* v. *United States*, 343 U.S. 747, 749-50, n.3 (1952), reh. den., 344 U.S. 848 (1952); *United States* v. *Bender*, 7 Cir., 218 F. 2d 869 (1955), cert. den., 349 U.S. 920 (1955); *United States* v. *Furlong*, 7 Cir., 194 F. 2d 1 (1952), cert. den., 343 U.S. 940 (1952). The exception to this general rule of nonreviewability is the "plain error" doctrine provided in Rule 52(b) of the Federal Rules of Criminal Procedure, Title 18 U.S.C.A. Here, the record reveals no plain error in the ruling of the trial court now challenged.

Appellant argues that even if no proper objection were made, the Government was required to establish the consent of one of the parties to the conversations before examining the witnesses about the contents of the conversations. On the contrary, the burden is on the party opposing the admission of the evidence to establish that the communication was intercepted in violation of § 605. *Nardone* v. *United States*, 308 U. S. 339 (1939); *United States* v. *Campbell*, 7 Cir., 337 F. 2d 396 (1964), cert. den.,

379 U. S. 983 (1965). If one of the parties consents to the monitoring of the communication, there is no "interception" and evidence of the contents of the communication is admissible. *Rathburn* v. *United States*, 355 U. S. 107 (1957), reh. den., 355 U. S. 925 (1958), but the consent must be voluntary, *Weiss* v. *United States*, 308 U. S. 321 (1939). In *Weiss*, evidence of the intercepted communication was excluded because the requisite consent was obtained by means of a promise of leniency to certain defendants who had been parties to the communication. In *Weiss*, there was no knowledge of or consent to the interception, and the *consent to divulgence* was obtained by means of promised leniency. Here, every fair inference to be drawn establishes that Haney consented to the monitoring of his calls to appellant. There is nothing in the record to indicate that threats or promises were used to obtain his cooperation and consent.

Appellant further contends the trial court erred in preventing him from cross-examining the witness Haney concerning his residence. Appellant relies on *Alford* v. *United States*, 282 U. S. 687 (1931). In *Alford*, the defendant was not permitted to cross-examine a Government witness about his residence. The Supreme Court reversed defendant's conviction on the ground that the defendant should have been permitted to probe the witness' background as a possible aid to impeachment:

> "Cross-examination of a witness is a matter of right * * *. Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood * * *; that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment * * *; and that facts may be brought out tending to discredit the witness by showing that his testimony in chief was untrue or biased * * *." *Id.* at 691-92 (citations omitted.)

In the instant case, Haney was not permitted to testify concerning *his address at the time of trial*, but was per-

mitted to testify that his address at the time of the first heroin purchase from appellant was 7104 Union Street, Chicago, Illinois. Agent Cook testified that after the third, fourth, and fifth purchases from appellant, he drove Haney to 71st and Union Streets; from this it could reasonably be inferred that Haney's residence continued at the Union Street address. Other aspects of Haney's background, including his prior murder conviction, his prior arrest for carrying a gun without a permit, his employment record, and his arrest for sale of narcotics shortly before he began cooperating with narcotics agents, were brought out on direct and cross-examination. Defense counsel were permitted to inquire whether Haney received compensation from the Government, whether he had used an alias, and whether he had been promised leniency in return for his cooperation. In light of the wide latitude allowed on cross-examination, the trial court's refusal to permit cross-examination concerning Haney's residence at the time of trial was not prejudicial error. Haney was sufficiently identified with his community to enable appellant to investigate his reputation for truth and veracity in that community. His personal character was deeply probed by defense counsel.

Appellant contends that the trial court erred in permitting Narcotics Agent Meyer, who was the Government's third witness, to remain at Government counsel's table, after excluding all other witnesses on defendants' motion. When the Government asked for an exception to permit Agent Meyer to remain in the courtroom, a long colloquy ensued between the trial court and counsel, during which the court repeatedly indicated it would grant the exception in favor of Agent Meyer, but recommended to Government counsel that he not insist upon the exception, unless necessary. Appellant seizes upon the court's remarks as evidence that it abused its discretion by failing to exercise it.

It is well-established that the exclusion of witnesses is within the sound discretion of the trial court, and failure to exclude witnesses does not constitute error

unless there is a clear abuse of discretion. *United States* v. *Eley*, 7 Cir., 314 F. 2d 127 (1963); *United States* v. *Cephas*, 7 Cir., 263 F. 2d 518 (1959); *Powell* v. *United States*, 6 Cir., 208 F. 2d 618 (1953), cert. den., 347 U. S. 961 (1954), reh. den., 347 U. S. 979 (1946). Contrary to appellant's argument, the trial court exercised its discretion by determining to follow the rule excepting an investigative officer from the order excluding witnesses. There is no substance to this contention.

As a final ground for reversal the appellant argues the trial court erred in replacing a juror with an alternate juror without a hearing at which appellant was present. Rule 24(c) of the Federal Rules of Criminal Procedure, Title 18 U.S.C.A., provides that "alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties." Appellant argues that Rule 43, which provides that "the defendant shall be present * * * at every stage of the trial including the impaneling of the jury * * *," requires that the determination of a juror's disqualification or inability to perform be made in an open hearing. The same issue was recently presented to the Second Circuit in *United States* v. *Houlihan*, 2 Cir., 332 F. 2d 8 (1964); cert. den., 379 U. S. 828 (1964). The court found no error:

> "Although every effort should be made to afford such an opportunity, we do not think that failure to do so in a case such as this presents grounds for reversal. Situations may sometimes arise when a respect for the rights of jurors will require the judge to take immediate action without consulting counsel—*e.g.*, if a juror is taken so ill that he cannot come to court or has a family emergency requiring him to leave during the night or over a weekend. We hold that no error was committed by the trial judge in excusing the juror prior to the arrival of defendants and their counsel." *Id.* at 13.

Here the record indicates that the replaced juror failed to report on March 16, 1966, when the trial resumed after an adjournment of one day. The trial court informed counsel that *the juror had not recovered from a virus* and that it had replaced her with the alternate juror. Appellant made no objection and the trial continued. The juror's illness was an emergency justifying the trial judge in acting summarily. Such summary action does not constitute error in the absence of a showing of prejudice. *United States* v. *Ellenbogen*, 2 Cir., 365 F. 2d 982 (1966), cert. den., 386 U. S. 923 (1967); *United States* v. *Houlihan, supra.* Appellant has shown no prejudice. Counsel were well aware of the regular juror's illness, as her illness required the court to recess twice and adjourn early on the afternoon of March 14. There is no merit to this contention.

Finding no prejudicial error, the judgment of conviction appealed from is affirmed.

AFFIRMED.

No. 15813

SCHNACKENBERG, *Circuit Judge*, dissenting.

The record shows that the credibility of Ted Haney, a government witness, was vulnerable to attack on the grounds (1) that he had been convicted of murder and (2) that he was an informer who, in return for immunity from prosecution, provided evidence against defendant. Recognizing both of these grounds, defense counsel tendered to the court the following instruction, which was *rejected*:

> "You are instructed that Ted Haney is an informer for the Bureau of Narcotics. The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage or vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been

affected by his interest or his prejudice against the defendant.

"*You are further instructed that the evidence shows that the informer, Ted Haney, has been convicted of a felony. The testimony of a witness may be discredited or impeached by showing that he has been convicted of a felony.* As such, his testimony must be carefully examined and weighed with great care." (Italics supplied here for emphasis.)

The court then instructed the jury as follows:

"If you find from the evidence that Ted Haney is an informant of the Federal Bureau of Narcotics, you may consider the principles that the testimony of an informer who provides evidence against the defendant or for immunity from punishment or personal advantage or vindication must be examined and weighed by you with greater care than the testimony of an ordinary witness. As such his testimony must be carefully examined and weighed with great care."

The court then proceeded with a number of instructions on other aspects and thereafter instructed the jury as follows:

"Evidence of a *defendant's* previous conviction of a felony is to be considered by you only insofar as it may affect the credibility of the *defendant* as a witness and must never be considered by you as evidence of guilt of any of the offenses for which he is standing trial." (Emphasis added.)

This instruction does not refer to the witness Haney, because he was not "standing trial". It is obvious that the court erred in rejecting the tendered impeachment

instruction which applied a well-established *test to the value of the testimony of Haney.*[1]

In so instructing the jury after rejecting the instruction tendered by defense counsel, the court abused its discretion. In addition it must have confused the jury.[2] I would reverse and remand for a new trial.

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[1] The Committee on Jury Instructions, of which Judge Walter J. LaBuy was chairman, in a *Manual on Jury Instructions* (1963), said at page 46:

6.06-2 *Conviction of a Felony*

The testimony of a witness may be discredited or impeached by showing that he had been convicted of a felony. Prior conviction does not render a witness incompetent to testify, it merely reflects on his credibility. It is the province of the jury to determine what weight, if any, should be given to such prior conviction as impeachment.

[2] The able district judge seemed to sense this, saying:

"• • • I apologize for letting this out but you might have sensed that I was perturbed about this matter of instructing. Very well, gentlemen. Good luck to both sides. I have no interest in the matter whatsoever. Let the chips fall where they may."

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, November 1, 1967

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SAM GARAFOLO, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 15813

It Is Ordered that the petition for rehearing of this cause filed by defendant-appellant be, and the same is hereby Denied.

(Judge Schnackenberg voted to grant the petition for rehearing.)

APPENDIX B

(Tr. 42)[1]

"Mr. Smith: Your Honor, prior to bringing in the jury, I would move at this time for the exclusion of witnesses from the courtroom.

"Mr. Phelan: With the exception of the defendants and the one agent who will be seated at counsel table.

"Mr. Smith: I object to this agent being in the courtroom if he is going to be an occurrence witness.

"Mr. Whalen: The defendant, Dicaro, of course, joins in that, your Honor.

"Mr. Ahern: As does Cordovano.

"The Court: Will he be an early witness?

"Mr. Phelan: Your Honor, he will be a fairly early witness. He won't be one of the first two.

"The Court: Will the first two be occurrence witnesses?

"Mr. Phelan: Yes, they will.

"The Court: Can you make his testimony first? Can you go out of order?

(Tr. 43)

"Mr. Phelan: Your Honor, I really can't in this case. There is one agent who is in from New York who would like to get back. We would like to get him on and off the stand today. This witness will not corroborate insofar as these two first people are concerned.

"The Court: Will his testimony relate to the same transaction or the same incident that the testimony of the agent from New York will?

"Mr. Phelan: They will all be connected in some way but as to the direct events which took place as far as inside or outside of a certain building, he will not testify as to the exact same things.

"The Court: This grant of grace, which has been customary over the years—in fact, I don't remember when it didn't exist, and I used it all of the time, I

[1] "Tr." refers to the Transcript of Proceedings of the trial Court.

always allowed it and I used to request it as a prosecutor—is coming under a direct attack and it might be better for the welfare of your case if there happens—and I do not suggest that there will be a conviction in the case, but that this issue not be raised.

"I think that it would be wiser (Tr. 44) *if you can arrange your testimony so that the agent that you need beside you during the course of the trial of the case can appear as early as possible and that I allow a complete exclusion under the circumstances.*

• • •

"Mr. Phelan: Well, excuse me, but I can certainly see the Court's position on this; but insofar as the first two witnesses are concerned, they will be testifying to transactions for the (Tr. 45) most part that happened inside a certain place.

"This witness' testimony will be concerning things that happened outside. In that way they do come together but only in that regard, so that—

"The Court: They will not be occurrence witnesses as to the same occurrence, is that right?

"Mr. Phelan: Well, they run together, your Honor, but they are not exactly identical. I don't know how much more clearly I can explain it.

"The Court: *Well, I leave it up to you. I will allow you the motion, I mean, I will allow the motion and I will allow you the exception, but I let you know that you take a grave risk on your case. At this stage, as I see the way the cases are going on the level of the Courts of Appeal in other parts of the country, if I were a prosecutor I just wouldn't take that chance. If I felt that this was an important case I just would not take the chance.*

"Mr. Phelan: Your Honor, if this were the situation, it must be grounded, I would think, although no grounds have been set forth by the defense, that by sitting here in the courtroom (Tr. 46) he will only tend to corroborate the testimony that has been given by the previous witnesses.

"The Court: The rule of exclusion is a great and old rule. On the state level it has already moved this

far. *It means not only the exclusion as to the witnesses from the courtroom but as to each other, that they cannot in any way confer with each other during the course of the trial. After a witness has testified he must be separated out from all of the other witnesses.*

"It is a very strong old rule that we have maintained and succeeded in maintaining in the Seventh Circuit, a jurisdictional exception, an exception on behalf of the investigative agent who was in charge of the investigation, that he may be seated with the prosecutor as an aid to him.

"*You may proceed in that manner but I let you know that as the law is developing you may have a case back on your hands, and the more important the case to you*—I don't want to use the phrase other than to say that often the bad (Tr. 47) law of which prosecution complains to the courts and say that, 'The courts are turning loose the criminals,' and this, that and the other, and blames the Supreme Court, *is law that has been ineptly made necessary by prosecutive determination to utilize unnecessary advantages* and, unless it is exceedingly necessary to your procedure, the exclusion would be of no moment as far as your special assistant is concerned, only as to the witnesses prior to his testimony.

"Once he has testified, just as with any other witness, once a witness has testified he may stay in the courtroom throughout the rest of the trial, and if he is needed during the testimony of your first two witnesses, if you really need him, then you have one situation, but if his presence isn't really necessary to your handling of the case during the testimony of the first two witnesses—

"Mr. Phelan: Your Honor, I think that his presence—

"The Court: (Continuing:) —but this is only an advisory matter. I am not ruling on it. I am (Tr. 48) allowing it.

"Mr. Phelan: Your Honor, if I may, for the record, I would like to state that his presence is as necessary

to the government as the presence of the defendants is to the defense attorneys.

"I think in view of the fact that the same considerations apply both in regard to testimony elicited from defense witnesses as well as the government witnesses—

"The Court: *The presence of defendants in a criminal case is a matter of constitutional right of confrontation, and that is not a matter of necessity, it is a matter of constitutional right. There is no comparable right on the part of the government,*

"This is a funny thing. There are many things which defendants have a right to but the government doesn't have a right to.

"Mr. Nash: Your Honor, I would state also that in no way does the government try to take advantage or get any advantage by having Mr. Meyer sit there over the defendants; it is merely the advantage that we may be informed as to the exact happenstance of the events as to the testimony is (Tr. 49) elicited, any cross examination that might be elicited. It is merely for our aid.

"Mr. Ahern: The defense is concerned that it will go well beyond that, your Honor, and that is why we would like him not in the courtroom until he testifies. If he is going to be a rebuttal witness, we would like our motion to extend to all witnesses who might be called in rebuttal.

"In other words, after they testify, we don't feel they should sit in here and listen to the testimony and then be permitted to tae the stand and rebut that testimony.

"The Court: On rather firm legal grounds they pose a serious legal problem to you.

"Mr. Phelan: Your Honor—

"The Court: *But that is up to you. I can try a case the second time. I just might have a retrial of the case on that issue, but this is up to you.*

"Mr. Phelan: Your Honor, I believe we will have time between now and the time the first word of testimony is heard to do a little research on this matter.

(Tr. 50)

"Mr. Whalen: Opening statements is what we are concerned with also. We would urge the Court to consider that the same reasons for the exclusion of this witness, maybe even more so, because he is in a position to participate in the prosecution.

"The Court: I don't want you to feel that I am joining on the side of the defendants I am not, *but I do think that the way you meet serious tactical problems is to not be persistent in unnecessary things, but this is up to you.* I mean, this is a tactic of yours, too.

"*If I were a prosecutor I would never allow one basis for an objection on appeal that I could get around. If I had a case and I thought it was a really important case, I wouldn't allow the chance of its being reversed growing out of my being insistent upon keeping somebody in the room that I need as a witness. I would master that case outside of the courtroom.*

"Let the record show that I am trying to be pleasant about it. I would master it outside of the courtroom. I wouldn't take a chance on it. *This is up to you. If you want this, I will* (Tr. 51) *allow it,* and I will be consistent with the old procedure. Mr. Myer may remain.

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(Tr. 52)

"It has been a matter of discussion, I can say that, in judicial circles. Keeping abreast with the law is not merely to keep abreast of the decisions that have been handed down, but in the trend of the legal thinking of the entire judicial aura that hovers over our legal profession. I would suggest that that is rather serious. You can understand my concern, not as a judge but as a member of the President's Crime Commission. It seriously is moving in the direction of the defendants in these cases. *One of the causes for its moving in that direction is the countering of tactical moves by defense with untactical persistence in old*

procedures by the prosecution which causes our crime commission to sort of suggest that we recommend seminars for prosecutions, particularly (Tr. 53) on state levels—of course we are concerned about state levels as well as federal—as regularly as possible, serious seminars.

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"The Court: You do have this problem, and that is this would carry over to other cases, I mean, you have the problem of, 'Is this going to be something now that we are going to have to face in every case where we can't retain our agent?'

"This is a serious problem because you do need the agent with you in many, many cases.

"Mr. Nash: We think we do need him in this case.

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(Tr. 54)

"The Court: • • • *At the same time, at least take a look at this before you object. At the same time, I will rule for you on this, whichever way you go,* because of the tradition and custom, and I have precedent in the court with which to rule, but I do call this to your attention, that Mr. Ahern and the other lawyers for the defense are not calling up something idle, they are not just being persnickety or difficult.

"Mr. Nash: We don't attribute it to that at all, your Honor.

"The Court: Do you see what I mean? They are men of great experience. They know what is (Tr. 55) going on. This may be just the case which will set a precedent or set a practice. I quoted that section a minute ago about being an adviser. I hope all of the parties will forgive me for advising in this respect, but I have to allow their motion for exclusion and the grace to the other is the exception.

"This has been tradition, you see. I will allow that. However, you may be getting into hot water and hotter water than you ought to be getting into considering your case. You might try it in a weaker case." (All emphasis added.)